No. 126, Original

In The

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

KANSAS' MOTION TO STRIKE NEBRASKA'S COUNTERCLAIMS, BRIEF IN SUPPORT, AND MOTION FOR APPOINTMENT OF SPECIAL MASTER

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KANSAS' MOTION TO STRIKE NEBRASKA'S COUNTERCLAIMS

Comes now the State of Kansas and moves the Court to strike the State of Nebraska's newly filed counterclaims against the State of Kansas for the reason that they were filed without leave of the Court, as more fully discussed in the following brief.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO STRIKE NEBRASKA'S COUNTERCLAIMS

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BRIEF IN SUPPORT OF MOTION TO STRIKE NEBRASKA'S COUNTERCLAIMS

INTRODUCTION

On January 20, 1999, the Court granted Kansas' Motion for Leave to File Bill of Complaint. *Kansas v. Nebraska*, 119 S. Ct. 865 (1999). Nebraska then filed three counterclaims. Answer and Counterclaim of the State of Nebraska, at 6-14. These counterclaims constitute three new claims against Kansas that Nebraska is asking the Court to resolve in the Court's original jurisdiction. Nebraska did not precede its three new claims with a motion for leave to file those claims. The Court should not be expected to resolve new claims in its original jurisdiction, nor should Kansas be subjected to such claims, without the important procedural step of considering whether the claims meet the threshold standards set by the Court.

ARGUMENT

The Court has made clear that it will not entertain every claim sought to be heard in the forum of its original jurisdiction. In fact, the Court has stated that the original jurisdiction should be used only "sparingly." See *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976); cited in *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). In *Mississippi v. Louisiana*, Chief Justice Rehnquist, delivering the opinion for a unanimous

Court, stated: "Indeed, Chief Justice Fuller wrote nearly a century ago that our original 'jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.' *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)." *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992).

The precise question raised by the current motion is whether these same principles apply to the filing of counterclaims by a state in a case, such as this, where another state has been granted leave to file a bill of complaint. In other words, in filing counterclaims, is Nebraska relieved of the duty to honor the Court's " 'substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court?' " *Ibid.* (citing *Texas v. New Mexico*, 462 U.S. 554, 570 (1983)). Kansas submits that it is not. Moreover, Kansas believes it has substantial grounds to challenge the Nebraska filing pursuant to the standards applied by the Court in considering motions for leave to file.

The function served by a motion for leave to file a counterclaim is not adequately served by allowing the plaintiff to file a motion to dismiss. Allowing or requiring the opposing party to file a motion to dismiss in order to fulfill the Court's gatekeeping function would run counter to the Court's policy regarding the filing of the initial claims by the plaintiff, and it would also reverse the burden on whether the Court's standards have been satisfied.

The analysis used by the Court, as recently set out in *Mississippi v. Louisiana, supra*, is first to look to " 'the nature of the interest of the complaining

State,' focusing on the 'seriousness and dignity of the *claim*.' " *Id.*, at 77 (citations omitted) (emphasis added). The Court then explores the "availability of an alternative forum in which the *issue* tendered can be resolved." *Id.* (citation omitted) (emphasis added). Thus, the Court has focused on the specific *claims* and *issues* presented. The Court in *Mississippi v. Louisiana* also noted that in *Arizona v. New Mexico, supra*, it had stated: " '[W]e are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated.' " *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citation omitted) (emphasis in *Arizona v. New Mexico*). Thus, the Court's granting of Kansas' Motion for Leave to File Bill of Complaint in this case, 119 S. Ct. 865 (1999), does not neccessarily open the Court's original jurisdiction to additional claims or issues beyond those raised by the Bill of Complaint.

The case of *Nebraska v. Wyoming*, 515 U.S. 1 (1995) is instructive in the present context. It demonstrates that the Court has not allowed original cases to extend beyond their initial scope without careful consideration. In that case, which is still pending as No. 108, Original, the Court granted Nebraska leave to file its petition. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987). Wyoming then filed a motion for leave to file a counterclaim, which was granted. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987). The Court later noted this series of procedural events in its opinion in 1995. *Nebraska v. Wyoming*, 515 U.S., at 5. Thus, the most recent example of the treatment of a proposed counterclaim in an interstate water case in the original jurisdiction involved the filing of a motion for leave to file the counterclaim and action by the Court on that

motion. In fact, the plaintiff in that case, Nebraska, is the opposing party here.

Nebraska v. Wyoming, No. 108 Original, is also instructive here because of the careful treatment given motions to modify the original claims in that suit. The states of Nebraska and Wyoming filed motions for leave to amend their pleadings. The motions for leave to amend were referred to the Special Master, whose recommendations were reviewed carefully by the Court. *Id.*, at 6. The Court emphasized the care that it takes in reviewing the proposed amendment of pleadings in its original jurisdiction:

> "Our requirement that leave be obtained before a complaint may be filed in an original action, see this Court's Rule 17.3, serves an important gatekeeping function, and proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings. See *Ohio v. Kentucky, supra*, at 644." *Id.*, at 8.

This principle applies equally to the filing of counterclaims. Counterclaims by their very nature, broaden the scope of the litigation by adding claims and therefore have the potential to "take the litigation beyond what [the Court] reasonably anticipated when [the Court] granted leave to file the initial pleadings." *Ibid.*

Nebraska has previously recognized the importance of the Court's gatekeeping function. In its Brief of the State of Nebraska and Request for Oral Argument in Opposition to Kansas' Motion for Leave to File Bill of Complaint (Opp. Brief) in this case, it quoted the Court's

statement that "not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a state." *Alabama v. Arizona*, 291 U.S. 286, 292 (1934); Opp. Brief, at 7 Nebraska also noted the Court's "traditional reluctance to exercise original jurisdiction in any but the most **serious of circumstances**. " Opp. Brief, at 7-8, citing *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (emphasis added by Nebraska). Moreover, Nebraska continues to assert, in the very filing setting forth its counterclaims, "that this Court's jurisdiction is not properly invoked in this case." *Kansas v. Nebraska*, No. 126, Orig., Answer and Counterclaim of the State of Nebraska, at 1, ¶ 1.

The Court's ruling on Kansas' Motion for Leave to File Bill of Complaint was the subject of seven briefs, including a brief by the Solicitor General of the United States at the special invitation of the Court. *Kansas v. Nebraska*, 119 S. Ct. 36 (1998). That briefing process on one claim by Kansas lasted eight months. In contrast, Nebraska now presumes that the Court is obligated to accept Nebraska's filing of three new claims without any opportunity for comment by Kansas or the Solicitor General.

In sum, Nebraska has sent three new claims to the Court. It has done so without leave of the Court. Nebraska's failure to file a motion for leave disregards the Court's well-established policy of threshold review for new claims in its original jurisdiction.

CONCLUSION

Kansas' Motion to Strike Nebraska's Counterclaims should be granted.

Respectfully submitted,

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MOTION FOR APPOINTMENT OF SPECIAL MASTER

Comes now the State of Kansas and moves the Court to appoint in this proceeding a Special Master with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such evidence as the Special Master may deem necessary to call for, and with the Court's direction to submit such reports to the Court as the Special Master may deem appropriate.

The grounds for this motion are that the Bill of Complaint and the Answers demonstrate that factual disputes exist among the states, the resolution of which can most conveniently be achieved by the appointment of a Special Master.

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